IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.P.BALACHANDRAN

MONDAY, THE 19TH FEBRUARY 2007 / 30TH MAGHA 1928

WP(C).No. 5054 of 2004(B)

OS.1200/2000 of II ADDL. MUNSIFF'S COURT, ERNAKULAM

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PETITIONER:

DR.A.K.MEHAR ALI, DOCTOR BY PROFESSION,
AGED 32 YEARS, S/O. DR.A.K.SIDHIQUE,
KARIKULAM HOUSE, AZHIKODE, KODUNGALLUR,
TRICHUR DISTRICT

BY ADV. SRI.P.O.JOSEPH

RESPONDENTS:

1. M/S. TECHNO EXIM 9P) LTD., REPRESENTED
BY ITS DIRECTOR, K.SADASIVAN, AGED 60 YEARS,
H.NO.XXXVI/648, T.D.ROAD, COCHIN-11, RESIDING AT
KUTTATTU HOUSE, MEKKADAMBU P.O., MUVATTUPUZHA.

2. K.SIVARAM PILLAI S/O.PARAMESWARAN PILLAI,
AGED 62 YEARS, KOCHI KOTTARATHIL,
KARIPPUZHA P.O., MAVELIKKARA, ALAPPUZHA DISTRICT.

R1 BY ADV. SRI.SHAJI THANKAPPAN

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 19/02/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.P. Balachandran, J.

W.P.(C)No. 5054 of 2004 B

JUDGMENT

The petitioner is the first defendant in O.S. No.1200/00 on the file of the Munsiff's Court, Ernakulam. He challenges in this writ petition Exhibit P3 order passed by the trial court on 15.12.2003 refusing to decide in his favour issue No.1, as to whether the suit is maintainable or not?

2. The plaint, as originally instituted, was one for declaration only. Subsequently, a prayer was incorporated by amendment of the plaint seeking for a declaration that order of eviction passed in R.C.P.No.52/94 on the file of the Rent Control Court, Ernakulam, obtained by the petitioner, is not binding on the first respondent/plaintiff. The

contention was that in view of the amendment of the plaint, incorporating prayer for declaration that order in R.C.P.No.52/94 aforesaid is not binding on the first respondent company, the suit itself should have been found not maintainable, as such disputed matters are to be considered by the learned Munsiff in execution under Section 47 of the Code of Civil Procedure. It is submitted by the counsel for the petitioner that injunction sought for in O.S.No.1200/00 was refused and the injunction petition was dismissed. C.M.Appeal No. 148/02 filed against the dismissal of the said injunction petition was also dismissed by the appellate court concurrently, holding that the claim advanced in the suit is a matter, which falls for adjudication under Section 47 of the CPC. The first respondent has not assailed the concurrent finding on the injunction petition as aforesaid.

3. The learned Munsiff has held that inasmuch as fraud is alleged to have been played in the matter of obtaining an order of eviction, an opportunity must be granted to the first respondent to prove the said allegation rather than dismissing the suit as not maintainable without adverting to the facts and merits of the case. The order so passed does not mean that maintainability of the suit was not considered by the learned Munsiff, but it meant only that it is not proper to consider it as a preliminary issue. The learned Munsiff also directed to include the suit for trial in the list on 12.2.2004, which could not be done only because the petitioner himself has taken up the matter before this Court in writ petition and this was lying over for more than two years.

In the circumstances, I dispose of this writ petition directing the II Additional Munsiff,

Ernakulam, before whom O.S.No.1200/00 is pending, to dispose of the suit at the earliest and in any event within three months from the date of receipt of a copy of this judgment. While deciding the case on merits, suffice it to say that he has to consider the maintainability of the suit in view of Section 47 of the CPC, as contended by the petitioner.

19th February, 2007 (K.P.Balachandran, Judge)

tkv